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Next Meeting:

November 10, 2009

10 am, GPO

Carl Hayden Rm

Congress Approves DOD IG Testimonial Subpoena Authority Without Attorney General Consultation Requirement

H.R. 2647, the National Defense Authorization Act for FY 2010 (NDAA), was passed by Congress on October 22 and sent to the President for signature. Section 1042 of H.R. 2647 would provide the DOD IG with authority to subpoena "the attendance and testimony of witnesses as necessary in the performance of functions assigned to the Inspector General" under the IG Act. The legislation only requires that DOD IG notify the Attorney General seven days before issuance of such a subpoena.

In an attempt to develop an IG consensus on the issue, the Legislation Committee surveyed the CIGIE membership. Seventy percent of respondents agreed that any testimonial subpoena authority granted to IGs should not be subject to any external consultation or review. The Legislation Committee summarized the survey results in letters to the Senate Homeland Security and Government Affairs Committee and to Senator McCaskill.

Based in part on CIGIE input, as well as input from the Departments of Justice and Defense, the DOD subpoena language, which originally required consultation and approval by the Attorney General to issue such a subpoena, was amended. The [Conference Report](#) has the full text of the testimonial subpoena authority provision as amended.

S. 1745 – The Non-Federal Employee Whistleblower Protection Act of 2009

On October 1, Sen. McCaskill (D-MO) introduced [S. 1745, The Non-Federal Employee Whistleblower Protection Act](#), which would provide non-Federal employees whose disclosures involve misuse of Federal funds with protections against retaliation. S. 1745 follows H.R. 1507, the Whistleblower Protection Enhancement Act of 2009, with its companion [S. 372](#).

Among other things, S. 1745 would require an IG to investigate all claims of reprisal for covered disclosures unless the IG determines that the complaint is frivolous, does not relate to covered funds, or has already been adjudicated in another appropriate forum. Without such a determination, the IG would have 180 days to submit an investigation report to the complainant, the non-Federal employer, and the contracting agency. The IG could extend this 180 day reporting requirement for any additional time period agreed to by the complainant, or for an additional 180 days provided the IG furnishes written justification for the extension to the complainant, the non-Federal employee, and Congress.

An IG would be permitted to discontinue an investigation only when the IG furnishes written justification to the same parties, in which case the complainant

would assume an immediate right to a civil remedy. Throughout the course of an investigation, the complainant would be provided with access to the complete investigation file unless doing so would violate the law or impede another continuing investigation.

To affirmatively establish a reprisal, the complainant would need to show that a protected disclosure was a contributing factor in an adverse action against him or her (i.e., an official took an action knowing of the disclosure, and the action occurred within a reasonable time after the official learned of the disclosure). The non-Federal employer would then be able to rebut the presumption with clear and convincing evidence that the action would have been taken absent the disclosure.

The Legislation Committee has previously communicated concerns regarding [H.R. 1507](#) to the relevant congressional committees. The Legislation Committee is currently reviewing S. 1745 and will prepare a letter to Senator McCaskill consistent with the previous position. See also below regarding [S. 372](#).

S. 1490 – The Personal Privacy and Security Act of 2009

On July 22, Sen. Leahy (D-VT) introduced [S. 1490, The Personal Privacy and Security Act of 2009](#). The bill was referred to the Judiciary Committee and currently has five cosponsors. The purpose of the bill is to prevent and mitigate identity theft and to protect personally identifiable information (PII). Many of its provisions, particularly those related to notification and enforcement, are identical to those contained in [S. 139, The Data Breach Notification Act of 2009](#). S. 139 is slated for full committee markup on October 29. Like S. 139, S. 1490 would require that business entities and Federal agencies notify individuals of security breaches of PII and notify the U.S. Secret Service of certain PII security breaches. Neither bill mentions any coordination with, or notification to, Inspectors General of affected Federal agencies.

The Legislation Committee surveyed CIGIE on its views of S. 139 last May. Regarding the lack of an IG notification requirement, 92% of respondents noted that S. 139 should specifically state that IGs be notified of security breaches by their respective agencies. On July 10, we sent letters based on the survey results to S. 139's sponsor, Sen. Feinstein (D-CA), as well as to Armed Services Committee Chairman Leahy (D-VT) and to Ranking Member Sessions (R-AL). The Committee is currently working on similar letters regarding S. 1490.

S. 942 – The Government Charge Card Abuse Prevention Act of 2009

[S. 942, The Government Charge Card Abuse Prevention Act](#), was voted out of the Senate by unanimous consent on September 21. The legislation would require IGs to conduct periodic assessments of their agencies' purchase card or convenience check programs and to report finding and recommendations to agency heads and the OMB. S. 942 has two companion bills, [H.R. 216](#) and [H.R. 2189](#). Both were introduced by Rep. Wilson (R-SC), and both have been referred to the House Oversight and Government Reform Committee and to the House Armed Services Committee. We will continue to monitor the legislation and to update CIGIE accordingly.

New Survey on Proposed Whistleblower Protection Act Ombudsman Requirement

The Legislation Committee recently developed a short survey to determine the sense of the IG community regarding a provision in [S. 372](#), otherwise known as the Whistleblower Protection Enhancement Act of 2009. The bill would amend Section 3(d) of the Inspector General Act of 1978 to require IGs to designate a Whistleblower Protection Ombudsman. (This particular section is not found on the original text of the Bill because it was amended in committee.)

In particular, Sec. 120(a) of the Act requires that IGs "designate a Whistleblower Protection Ombudsman who shall advocate for the interests of agency employees or applicants who make protected disclosures of information; educate agency personnel about prohibitions on retaliation for protected disclosures; and advise agency employees, applicants, or former employees who have made or are contemplating making a protected disclosure." The results of the survey will be communicated to the respective committees of jurisdiction.

If you want more information about other IG related legislation, please click [here](#).